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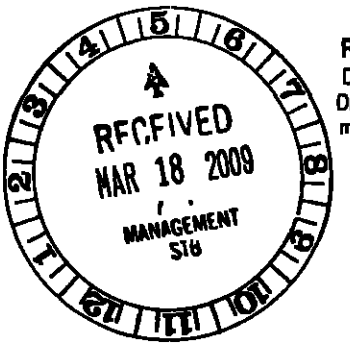
March 18, 2009



BY HAND DELIVERY

Anne K Quinlan
Secretary
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

Re Docket No AB 167 (Sub-No 1189X)
Consolidated Rail Corporation—Abandonment
Exemption -- in Hudson County, New Jersey 224705

Docket No AB 55 (Sub-No 686X)
CSX Transportation, Inc —Discontinuance
Exemption—in Hudson County, New Jersey 224706

Docket No AB 290 (Sub-No 306X)
Norfolk Southern Railway Company—
Discontinuance Exemption—in Hudson
County, New Jersey 224707

Dear Secretary Quinlan

Enclosed for filing with the Board are the original and ten copies of Consolidated Rail Corporation's Reply to City Parties "Restatement of Previously Requested Relief and Reservation of Rights " Please date-stamp the enclosed extra copy and return it to our representative

Sincerely yours,

Robert M Jenkins III

RMJ/bs

Enclosures

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BEFORE THE
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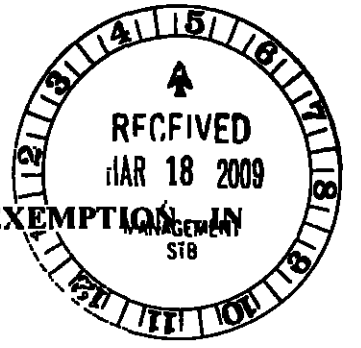

STB NO. AB 167 (SUB-NO. 1189X)

CONSOLIDATED RAIL CORPORATION – ABANDONMENT EXEMPTION – IN HUDSON COUNTY, NEW JERSEY

STB NO. AB 55 (SUB-NO. 686X)

CSX TRANSPORTATION, INC. – DISCONTINUANCE EXEMPTION – IN HUDSON COUNTY, NEW JERSEY

STB NO AB 290 (SUB-NO. 306X)

NORFOLK SOUTHERN RAILWAY COMPANY – DISCONTINUANCE EXEMPTION – IN HUDSON COUNTY, NEW JERSEY

NOTICES OF EXEMPTION

REPLY TO CITY PARTIES' "RESTATEMENT OF PREVIOUSLY REQUESTED RELIEF AND RESERVATION OF RIGHTS"

Introduction

Consolidated Rail Corporation ("Conrail"), CSX Transportation, Inc ("CSXT"), and Norfolk Southern Railway Company ("NS") on January 6, 2009, filed combined Verified Notices of Exemption for abandonment (Conrail) and discontinuance of service (CSXT and NS), pursuant to 49 C F R § 1152 50(b) (out-of-service exemption), of property the Board has determined is a line of railroad requiring abandonment authority ("Harsimus Branch") in Jersey City, Hudson County, New Jersey See *City of Jersey City, Et Al —Pet for Dec Order*, STB Fin Dkt No 34818 (served August 9 and December 17, 2007) In order to provide time for the Board to address historic preservation issues before the Notices of Exemption in the above-

captioned cases became effective, Conrail contemporaneously filed a motion to stay the effective date of the Notices for 180 days and to waive certain pre-filing notification requirements

The City of Jersey City, Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition, and Rails to Trails Conservancy ("City Parties") and some other parties opposed Conrail's motion and objected more generally to the use of exemption procedures in this case In a decision served January 26, 2009 ("January 26 Decision"), the Board rejected Conrail's motion and dismissed the Notices of Exemption without prejudice to Conrail's refiling under the Board's normal exemption procedures set forth in 49 C F R § 1152 50 On February 26, 2009, Conrail refiled the Notices of Exemption under the normal procedures

On March 12, 2009, the City Parties filed a "Restatement of Previously Requested Relief and Reservation of Rights" ("Restatement") In that pleading, the City Parties restated (1) their objection to the use of exemption procedures in this case, (2) their allegation that Conrail has engaged in "anticipatory demolition" requiring suspension of historic preservation proceedings under Section 110(k) of the National Historic Preservation Act ("NHPA"), (3) their assertion that the Board should "void" or "invalidate" the deeds conveying the fee interest in the Embankment properties to their current owners, 212 Marin Boulevard, LLC, et al ("the LLCs"), and (4) their argument that the Board should require the preparation of an environmental impact statement ("EIS") rather than an environmental assessment ("EA")

Conrail replies below to each of the City Parties' arguments [1]

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[1] In describing the various properties underlying the Harsimus Branch, Conrail uses milepost numbers drawn from the original valuation maps pertaining to the right-of-way The City Parties complain that Conrail "for some reason" does not use milepost numbers that the Board drew from track charts in its August 9, 2007 decision in Docket No 34818 City Parties' Restatement at 4 n 4 Conrail's reason is simple The mileposts used by the Board do not correspond to the actual distances from the beginning of the Harsimus Branch at CP Waldo to the various points on the right-of-way that are relevant here Also, the Board in its August 9, 2007 decision did not

Argument

1 The City Parties' argument that the Board should not permit Conrail to use the normal notice of exemption process in this case (City Parties' Restatement at 4-5) has already been rejected by the Board In its January 26 Decision, the Board held (slip op at 4)

> The absence of traffic over the line for more than two years makes the line eligible for the notice of exemption process under 49 C F R 1152 50, that process would allow City Parties and other interested persons (including Interested Parties) to pursue their interests in environmental and historic prevention issues, as well as possible use of the line as an interim trail or some other alternative uses Neither City Parties nor Interested Parties have demonstrated on this record that the use of the notice of exemption process itself *is inappropriate in this situation*

The City Parties suggest that this holding was "merely dicta" (City Parties' Restatement at 4 n 3), but in fact the Board in its January 26 Decision ruled directly on the City Parties' repeated assertions that this case was too "controversial" for the use of exemption procedures As the Board stressed, the class exemption process in an abandonment case does not exempt the proceeding from environmental or historic review. See also *Consummation of Rail Line Abandonments That Are Subject to Historic Preservation and Other Environmental Conditions*, STB Ex Parte No 678, slip op at 1 (served April 23, 2008) [2] Indeed, as the Board noted with respect to the historic preservation issues that are at the heart of the "controversy" in this case,

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assign milepost numbers to all of those points The only way accurately to pinpoint the mileage to the various points was to use the milepost numbers drawn from the valuation maps, which reflect the actual distances involved

[2] The class exemption only relieves Conrail of the transportation-related requirements associated with a full abandonment application While it may be appropriate to deny the use of a class exemption in a case with controversial transportation-related issues, see *Riverview Trenton R R Co – Acquisition and Operation Exemption – Crown Enterprises, Inc*, STB Fin Dkt No 33980 (served Feb 15, 2002), there is no tenable argument for requiring Conrail to file a full-scale abandonment application where the City Parties have raised no transportation-related issues

the Board's normal process specifically conditions any abandonment authority on completion of the Section 106 process January 26 Decision at 3

In short, the Board's express rejection of the City Parties' arguments against the application of the Board's standard exemption procedures in this case is both fully supported and the binding law of this case

2 The City Parties assert that Conrail's Notice cannot be processed because Conrail has allegedly violated Section 110(k) of the National Historic Preservation Act ("NHPA") City Parties' Restatement at 2 Section 110(k) is a prohibition against granting permits to applicants who engage in anticipatory demolition of historic properties with specific intent to avoid the Section 106 review process See, e g , *Committee to Save Cleveland's Hewletts v U S Army Corps of Engineers,* 163 F Supp 2d 776, 793 (N D Ohio 2001) (Section 110(k) "works to punish those who would seek to manipulate the Sec 106 process by denying them access to post-demolition permits "). *Young v General Services Admin* , 99 F Supp 2d 59, 82 (D D C 2000) (agency's job under Section 110(k) to determine if the applicant "intended to avoid the requirements of Section 106")

The specific "anticipatory demolition" about which the City complains is the removal of bridges and track from the Embankment properties between 1994 and 1997 without Board approval The City Parties have pointed to no evidence, however, that Conrail believed that any such approval was required Indeed, as the Board discussed in its August 9, 2007 decision in Docket No 34818, that demolition was part of a long-standing Jersey City redevelopment initiative Even before Conrail began operating in the Jersey City area in 1976, the City had begun redevelopment efforts to convert the few remaining industrial operations in the area to

high-end commercial developments [3] Slip op at 4 After Conrail took over, it worked closely with the City to sell off other properties in the Harsimus Cove area, including properties on the Harsimus Branch, to private developers and the Jersey City Redevelopment Agency Conrail viewed the Harsimus Branch as ancillary spur track that did not require abandonment before pieces of it were sold Id at 7

The last shipper was gone by 1992 Id at 4 The properties on the Harsimus Branch east of Milepost 0 88 (Marin Boulevard) had all been sold for redevelopment, to a number of different buyers, by the mid-1990s The remaining undeveloped parcels consisted of (a) six Embankment parcels between Mileposts 0 36 and 0 88, (b) two at–grade parcels between Mileposts 0 18 and 0 36 with concrete or stone piers that had supported a bridge raising the line up to the level of the first Embankment parcel, and (c) an at-grade parcel between Mileposts 0 00 and 0 18 With the strong urging of the City, all of the track and the bridges connecting the Embankment parcels and leading to and from those parcels were removed to facilitate redevelopment VS Ryan at 11-12, 14

The Jersey City Redevelopment Agency spent considerable time and money preparing to acquire and redevelop the six Embankment parcels VS Ryan at 14 However, the City lost interest in pursuing its own redevelopment plans when the six Embankment parcels were placed

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[3] As shown on Valuation Map V-1 01, ST-2, a significant piece of property at the east end of the Harsimus Branch on the Hudson River was sold off before Conrail began operations In a letter filed in this case on April 28, 2008, counsel for the City Parties complained (at page 5) that Conrail had not shown the Harsimus Branch extending to the water's edge on the Hudson River The reason Conrail did not do that is that the property at the easternmost end of the Harsimus Branch was not transferred to Conrail, and Conrail obviously cannot be required to abandon what it did not acquire When Conrail later listed the track it had acquired that it regarded as spur track, Conrail listed the Harsimus Branch as running from Milepost 0 00 to Milepost 1 36 Verified Statement of Conrail Witness Robert W Ryan, filed April 24, 2006, in Docket No 34818, at 13-14 (hereafter "VS Ryan") That is what Conrail is now seeking to abandon

on the New Jersey State Register of Historic Places in late 1999 Unable to interest the City in acquiring the property, Conrail in 2003 put the six Embankment parcels and the two at-grade parcels between Milepost 0 18 and 0 88 out for bids While the properties were out for bids, the City designated the six Embankment parcels as an Historic Landmark under the City's local historic preservation laws Conrail notified all bidders of the City's action and advised them that development of the property would be contingent on their compliance with the City's historic preservation laws VS Ryan at 15-16

SLH Properties was the only bidder that met Conrail's minimum bid requirements SLH formed eight limited liability companies to acquire the eight parcels The sale to the LLCs closed in July 2005 It was only ***after*** the sale to the LLCs had closed that the City claimed that authority was required from the Board for abandonment of Conrail's right-of-way

The City suggests in its pleadings that Conrail somehow engaged in "anticipatory demolition" within the meaning of Section 110(k) by selling the Embankment properties "for non-rail purposes" to a private developer in 2005 City Opp at 25-26 But there is no credible evidence that Conrail had any belief that Board approval was required for Conrail to dispose of the property [4] Absent a requirement for Board approval for abandonment, which could constitute an "undertaking" triggering the Section 106 process, there was no reason for Conrail to be concerned about that process 16 U S C § 470w(7) Thus, there is no basis for any finding by the Board that Conrail had any belief that Section 106 applied at all to disposition of the

[4] The City suggests that Conrail representatives asserted orally that the City's exercise of eminent domain was preempted, implying that the Embankment properties were regulated by the Board. City Parties' "Opposition" filed January 15, 2009, at 24 Those Conrail representatives, however, filed verified statements in Docket No 34818 denying that they made any statement to that effect *See* VS Ryan at 17 and VS Fiorilla at 2

Embankment properties, much less that Conrail acted with specific intent to avoid the requirements of Section 106

3 The City Parties restate their position that the STB should void the deeds conveying the Embankment properties to the LLCs They claim that this is justified because Conrail had no authority to transfer the Embankment properties and voiding the deeds is necessary to protect the Embankment properties from demolition and ensure compliance with the Section 106 historic review process City Parties' Restatement at 2, 6 None of these claims has any merit

It bears emphasizing at the outset that there is no fundamental difference between Conrail's conveyance of eight parcels of property on the Harsimus Branch to the LLCs in July 2005 and Conrail's earlier conveyance of properties on the Harsimus Branch to other developers and to the Jersey City Redevelopment Authority If the fact that Conrail may have made a mistake in deeming what remained of the Harsimus Branch spur track after Conrail took it over in 1976 were sufficient justification for the STB to void the deeds for the properties that Conrail sold off, then the STB would have to consider voiding the deeds of properties that have retail establishments, residential buildings, office buildings, and active light transit operations on them That obviously would make no sense There is no demand for freight rail service on any of these properties Conrail sold those properties, and the developers purchased them, in complete good faith [5] Conrail is not here disputing that it must now obtain abandonment authority in order to

[5] In contrast, the City cites a case, *The Land Conservancy of Seattle and King County - Acquisition Exemption—in King County, WA*, Fin Dkt 33389 (served Sept. 26, 1997), where a noncarrier had used an acquisition exemption to acquire an active jurisdictional rail line from a railroad, ostensibly for continued rail service, but immediately sought to abandon the line City March 28, 2008 Letter at 14 Rail labor complained that the noncarrier was effectively acting as a straw man to avoid the railroad paying labor protection in an abandonment proceeding The STB held that "when an acquiring noncarrier initiates abandonment proceedings within days

terminate its common carrier obligation over these properties, but there is no good reason to void the deed on these properties—with all of the attendant legal and contractual turmoil—as a condition of abandoning Conrail's common carrier obligation to non-existent shippers

In any event, the City Parties' assertion that voiding the deeds is necessary to protect against a "de facto" abandonment is incorrect City Parties' Restatement at 1 n 1 As noted above, there have been no shippers on the line for almost two decades Furthermore, railroads have never required a fee interest in the property underlying a freight rail right of way in order to meet their common carrier obligation See, e g , *Georgia Great Southern Division, South Carolina Central R R Co , Inc —Abandonment and Discontinuance Exemption—Between Albany and Dawson, Ga* , STB Dkt No AB-389(Sub-No 1X), 1999 WL 219645, at *3 (April 12, 1999) ("The agency has long found that it is consistent with the common carrier obligation of a railroad for the carrier to sell the underlying assets of a rail line while retaining an easement that is sufficient for carrying out rail operations ") Conrail did not expressly retain an easement over the Harsimus Branch properties it sold, but the effect of the STB's August 9, 2007 decision was to require that a rail freight right-of-way easement or license be constructively maintained on the Embankment properties owned by the LLCs until such time as Conrail obtains abandonment authority There is no need for the STB to void the LLCs' deeds for the six Embankment properties or the two non-Embankment properties to maintain Conrail's constructive common carrier easement

This is a commonsense legal proposition In *Columbiana Port Auth v Boardman Township*, 154 F Supp 2d 1165 (N D Ohio 2001), a railroad sold property, including a railroad

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after consummating the acquisition of the line, and there are no extenuating circumstances, our processes are being abused " Slip op at 3 The STB revoked the exemption and ordered the line reconveyed to the railroad, so that the railroad itself could seek abandonment (and be subject to labor protection). Such intentional misuse of the STB's processes is not present here

right-of-way, to a private business No abandonment authority was sought from the STB or its predecessor, the Interstate Commerce Commission ("ICC") Id at 1170 Subsequently, a public Park District condemned part of the property, including a segment of the railroad right-of-way, and paid a condemnation award to the private business Id at 1172 When a successor railroad claimed the right to operate over the right-of-way, the Park District asserted that it owned the right-of-way and sought to block rail operations Id at 1178 The court found that the right-of-way constituted a "line of railroad" that could not be abandoned without authorization from the STB, and that the Park District's acquisition of the real estate (like the private business's acquisition before it) was subject to an easement for rail service Id at 1172-75

Significantly, at no point did the court or any party in *Boardman Township* suggest that the original sale of the property to the private party and the subsequent condemnation of that property by the Park District must be unwound The court found that the railroad's right to provide rail service and the STB's authority to control the abandonment of the right-of-way was completely protected by the railroad's retention of an easement [6]

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[6] Also significantly, in *Boardman Township* the form of quitclaim deed that the original railroad owner had used to sell the property to the private business did not expressly retain an easement for a railroad right-of-way Rather, the quitclaim deed contained generic language under which the sale was made "under and subject to all public streets, roads, *easements and rights-of-way*, as evidenced by instruments of record or *as may be apparent on the premises* " Id at 1170 (emphasis in original) The court held that this language supported its determination that the transfer of the property was made subject to the railroad's right to continued use of the right-of-way Id at 1175-76

Conrail too used quitclaim deeds to transfer the Embankment properties to the LLCs, and those quitclaim deeds were also made "UNDER and SUBJECT to roads, alleys, bridges or streets . and any easements or agreements of record or otherwise affecting the Premises, and to the state of facts which a personal inspection or accurate survey would disclose " City Parties' Petition for Declaratory Order, filed January 12, 2006, Exh C, App 1 The STB's August 9, 2007 decision determined as a matter of law that Conrail had a continuing duty to maintain the ability to provide rail freight service over the properties it sold to the LLCs That

There is also no basis for the City Parties' assertion that voiding the deeds to the LLCs is required to protect the Embankment from demolition The City Parties suggest that because the LLCs are seeking development permits, with Conrail's support, if the deeds are not voided the STB's jurisdiction could be ignored City Parties' Restatement at 6 That is simply untrue The LLCs have committed not to demolish the Embankment until such time as the STB has finalized abandonment proceedings, including satisfaction of Section 106 conditions Furthermore, under New Jersey law, a developer is permitted to seek development permits, including demolition permits, in advance of having every permit and authority it needs to proceed Any permits the developer receives remain conditional until such time as the developer has finished obtaining all of the required prior approvals—whether local, state, or federal—that it needs for a project

When the Jersey City Historic Preservation Commission ("HPC") took the position that it did not have to process the LLCs' applications until after Conrail obtained abandonment authority from the Board, the LLCs filed an action in state court for an order directing the HPC to process the LLCs' applications The City and the HPC removed the action to the United States District Court, which remanded the matter to state court and ruled that STB approval was not required before obtaining local land use approvals Consequently, the City, the HPC, and the LLCs entered into a consent order requiring the HPC to take action on the requested applications for demolition permits

No one at any point suggested that if the HPC approves the LLCs' plans that the LLCs will be free to proceed with development of the properties absent the proper federal authority Conrail and the LLCs are well aware that the Embankment structures cannot be touched, so long

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duty can be met through the constructive maintenance of a rail freight easement over the property until Conrail is authorized to abandon

as the Board's August 9, 2007 decision is in force, unless and until abandonment of the Harsimus Branch is authorized by the Board [7]

Finally, the City Parties' claim that voiding the LLCs' deeds is necessary to "protect" the Section 106 process is also baseless Conrail is fully prepared to offer and provide the same historic preservation mitigation for the Embankment and for the Harsimus Branch as a whole that it would provide if it still owned the underlying fee interest in the property *Housatonic R R Co , Inc – Operation Exemption*, 1994 WL 156224, *5 (April 25, 1994), *Implementation of Environmental Laws*, 7 I C C 2d 807, 829, 1991 WL 152985, *14 (1991) Further, the LLCs have authorized Conrail to represent that they are prepared to participate as consulting parties in the Section 106 process Thus, voiding the LLCs' deeds is not necessary to "protect" the Section 106 process

4 The City argues that the STB should require the preparation of an Environmental Impact Statement ("EIS") in this proceeding City March 28 Letter at 7-10 The STB's regulations provide that ordinarily the STB will prepare an Environmental Assessment ("EA") in connection with abandonment of a rail line 49 C F R § 1105 6(b)(2) It is rare that the STB requires the preparation of an EIS in an abandonment case, and rarer still that it does so without first preparing an EA

[7] Under New Jersey law, N J S A 48 12-125 1, once Conrail has received abandonment authorization, Conrail may not sell or convey its right-of-way for 90 days, other than to the State of New Jersey, a county or municipality While Conrail does not concede the constitutionality of N J S A 48 12-125 1, Conrail nevertheless intends to meet the notice requirement of the statute It will wait 90 days to dispose of the right-of-way (If a public use condition is imposed under 49 U S C § 10905, Conrail will be required to delay disposition of the right-of-way for up to 180 days) If no government entity seeks to exercise eminent domain, Conrail will relinquish the right-of-way and the LLCs will continue with their ownership of the Embankment properties Of course, the LLCs will still not be able to develop the properties without the requisite state and local authorizations, and those authorities will still be free to initiate eminent domain proceedings against the LLCs

In a previous filing, the City Parties cited a case where the ICC required the preparation of an EIS, after first preparing an EA City Parties' March 28, 2008 Letter to SEA, at 7 But in that case the embargo of an 11-mile rail line in Maryland and the District of Columbia was going to result in coal being moved by truck instead of rail through city streets to a heating plant in Georgetown if the abandonment were authorized Accordingly, the key issue was the environmental impact of making permanent the use of substitute coal truck service through residential areas *The Baltimore and Ohio R R Co , Et Al – Abandonment and Discontinuance of Service—In Montgomery County, MD, and the District of Columbia*, Docket No AB 19 (Sub-No 112), 1988 WL 225973, * 2 (February 25, 1988) ("*B&O*") No such environmental impact is presented here [8]

The *B&O* case also involved seven bridges and a tunnel that had been found eligible for inclusion in the National Register of Historic Places The ICC held that if the railroad's salvage operations required the removal or modification of those structures, the railroad would be required to prepare historical documentation *Id* , *12 The railroad was also required to perform archeological testing before initiating salvage operations *Id.* That was the full extent of the historic preservation conditions imposed in that case

The Board routinely uses the EA process in cases where it imposes environmental and historic preservation conditions on abandonments *See* 49 C F R § 1105 6(b)(2) Moreover, under the NHPA, an agency's finding of adverse effects on historic property may not be

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[8] The City has asserted that there could be temporary environmental impacts attributable to the dust and noise resulting from the possible demolition of the Embankments, but such temporary impacts do not require the preparation of an EIS *See Chelsea Property Owners—Abandonment—Portion of the Consol Rail Corp W 30th St Secondary Track in New York, NY*, 8 I C C 2d 773, 793 and n 24 (1992) (because effects of demolishing elevated line, including through buildings, would be temporary and governed by local safety and noise ordinances, preparation of EIS was not warranted, and finding of no significant impact was justified)

"construed to require the preparation of an environmental impact statement where such a statement would not otherwise be required " 16 U S C § 470h-2(1) See also *Consolidated Rail Corp —Abandonment Exemption—in Mercer County, NJ,* STB Docket No AB-167 (Sub-No 1185X) (served Aug 10, 2006), slip op at 3 (EIS process not required to address historic preservation concerns where approval of abandonment was conditioned on completion of Section 106 process) The City has presented no valid reason for the Board to deviate from its normal procedure in this case

Conclusion

The Board's January 26 Decision rejected the City Parties' argument that exemption procedures were inappropriate for this out-of-service abandonment proceeding The Board held that the Notices of Exemption could be refiled under the standard procedures set forth in 49 C F.R § 1152 50 None of the City Parties' restated arguments against those procedures has any merit Nothing will happen to the Embankment properties pending the Board's decision authorizing abandonment All of the City Parties' and others' legitimate rights under Section 106 of the NHPA will be protected The Board should reject the City Parties' restated arguments

Respectfully submitted,

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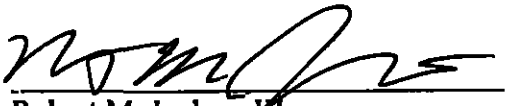

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Dated March 18, 2008

CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2009, I caused a copy of the foregoing "Reply to City Parties' Restatement of Previously Requested Relief and Reservation of Rights" to be served by first class mail (except where otherwise indicated) on those appearing on the attached Service List

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